BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN THE MATTER OF:	)	
[redacted]	)	
Petitioner,	)	
VS.	)	**DUE PROCESS HEARING NO. 97-56**
COFFEE COUNTY SCHOOL SYSTEM AND THE TENNESSEE DEPARTMENT OF EDUCATION,	)	**HONORABLE KIMBERLY WHALEY ADMINISTRATIVE LAW JUDGE**
Respondents.	)	

MEMORANDUM OPINION AND ORDER

This is a very complex matter involving [redacted], an eleven (11) year-old boy diagnosed with autism and severe mental retardation. Some relevant factual background is in order herein. [redacted] biological parents, [redacted], are legal residents of Tullahoma, Tennessee. In the summer of 1993, [redacted] parents requested and received permission from the Coffee County Board of Education by Superintendent Bobby Cummins for [redacted] to attend the Coffee County School System as an out-of-district student. [redacted] placement would have been in the jurisdiction of the Tullahoma City School System.

[redacted] was apparently diagnosed at a relatively young age and received special education and related services from the school system from August 1993 until his placement at the New England Center for Children (hereinafter "NECC"). At that time, the [redacted] were not charged tuition by the Coffee County School System. [redacted] was enrolled in a pre-school program. The following year he was placed in [redacted] special education class at

[redacted] School. He continued to receive services from the Coffee County School System until his placement at NECC in July 1996.

During the time [redacted] was in the public school system in Coffee County, various professionals have evaluated this child. These include Dr. Bill Brown (DC-495), Amy Harris-Solomon (DC-436, 448), Joan Cosgrove (DC-381) and Dr. Thomas Mates (DC-495). The school systems paid for Dr. Brown, Dr. Harris-Solomon and Ms. Cosgrove's evaluations. The Department of Mental Health and Mental Retardation (hereinafter "DMHMR") paid for Dr. Mates's evaluation. These professionals each did an individual evaluation of Davis and consulted with his teachers. Thereafter, the reports were provided to the school system and those recommendations were implemented. In looking at these particular exhibits cited, none of those particular professionals recommended residential placement. See also Transcript of Proceedings, March 23, 1998, Vol. I, pp. 114-118.

Sometime thereafter, [redacted] aggression and bolting behavior became difficult and served as a possible threat not only to himself, but to others. He was averaging two to three bolting incidents per month during April and May 1996. See Collective Exhibit 17, DC-484, 493, 497, 499, 501, 503, 505, 507, 511, 516, 519, 522, 531.

[redacted] began a very thorough search for placement and information for her child. She has spoken with experts in California and received the names of two (2) facilities in Boston. She went and explored these two (2) residential facilities and returned after only having examined one (1) convinced that her son needed to go to NECC. See Transcript of Proceedings, March 23, 1998, Vol. I, pp. 43-45.

She requested funding from the county. Coffee County declined at this point, as they were not convinced that residential placement was necessary for this child. [redacted] and

her husband then turned to contacting various political figures, including the Commissioners of Mental Health and Mental Retardation, Department of Children's Services and the Department of Education. They contacted various newspapers and went through other means of the news media. See Collective Exhibit 17, DC-1210-DC-1212. On or about July 1996, in an unprecedented move in the State of Tennessee, a Memorandum of Understanding was entered into between the Tennessee Department of Education, Tennessee Department of Mental Health and Mental Retardation and the Tennessee Department of Children's Services. This was after a Due Process Hearing had been initiated in the spring of 1996 alleging that [redacted] was not receiving a free, appropriate public education (hereinafter "FAPE"). After the articles appeared in the newspaper, the Commissioners of each of those respective State agencies developed a joint proposal to fund a placement at NECC for one (1) year. This agreement was placed in a Memorandum of Understanding. Lynn O'Neal testified at the hearing that the placement was intended to be for a period of one (1) year so that '[redacted] would receive training, would receive a lot of assistance with developing a more functional communication system, that negative behaviors such as bolting, darting, running, self-injury and aggressive behavior would be reduced, and all efforts would be made to transition [redacted] back home to Tennessee." See Transcript of Proceedings, March 12, 1998, Vol. II, pp. 225-228.

An actual review of the document revealed that full funding for the placement, including the parents' travel expenses, was to be borne by the State agencies. The agreement further provided:

> This agreement is not part of the M-team process and, therefore, shall not be used to hold the School District to future placement decisions, and the placement under this agreement does not constitute a "stay put" placement under the Individuals with Disabilities Education Act. Nothing in this Memorandum of Understanding shall be construed as an admission of the appropriateness or inappropriateness of the IEPs in this case.

See Collective Exhibit 17, DC-535.

As a result of that agreement, [redacted] was placed at NECC on July 3, 1996 and has remained at NECC thereafter. The parents did not disagree with the Memorandum of Understanding and did not further pursue their initial Due Process Hearing request of spring 1996. The Memorandum of Understanding initially expired on July 1, 1997, but was extended by the State agencies through September 30, 1997.

On September 24, 1997, an M-team was convened to discuss [redacted] placement. Prior to that on August 20, 1997, there had been an exchange from the parents' counsel requesting an M-team meeting, as it became aware the three (3) agencies were going to discontinue the funding after September 30, 1997. See Collective Exhibit 17, DC-765. On September 2, 1997, Coffee County received additional copies of records on the child from Rick Graff at NECC. See Transcript of Proceedings, March 26, 1998, Collective Exhibit 17, Vol. II, p. 770.

On September 10, 1997, Coffee County requested that the Tennessee State Department of Education (hereinafter "TDOE") extend the financial commitment to allow the child to remain at NECC through the 1997-1998 school year. See Transcript of Proceedings, March 26, 1998, Exhibit 17, Vol. II, p. 780.

It was then at the September 24, 1997, M-team meeting that an interim IEP was proposed by Coffee County. At that same time, there was an offer to fully fund the placement at NECC through December 31, 1997. The County explains that the purpose of this additional time period was to conduct new evaluations of the child and to conduct a consultation with an expert in the field of autism, Dr. B. J. Freeman, to determine an appropriate evaluation.

At that time, the parents agreed that the child would remain at NECC but did not agree that the placement was "not for educational purposes." See Transcript of Proceedings, March 26, 1998, Exhibit 17, Vol. II, p. 801.

On or about October 8, 1997, the parents again requested a Due Process Hearing alleging that the interim IEP was inappropriate because of the "non-educational placement language" in the IEP, the school system's failure to promptly evaluate and propose an IEP, along with the school system's failure to implement the proposed IEP by failing to contract with NECC from October 1, 1997 through December 31, 1997. The parents also filed suit against TDOE for its failure to properly supervise Coffee County and thus provide a free, appropriate public education.

Apparently at the same time, on or about October 22, 1997, Coffee County also requested a Due Process Hearing but the parents contend that they did not receive such request. Petitioners make a Motion that the Memorandum regarding Coffee County's request be included as part of Exhibit 17 in this record. This Court finds that if in fact such a request was made of Coffee County, it should have been contained in the child's cumulative record. As such, it is hereby ORDERED to be included in Exhibit 17.

Apparently, Dr. B. J. Freeman was retained to help evaluate the appropriate placement for the child. An on-site observation was conducted at NECC. Ms. Priscilla Vantreese, Director of Special Education for Coffee County, traveled with Dr. Freeman to visit the NECC program and observe the child. Ms. Vantreese also accompanied Dr. Freeman to Memphis, Tennessee to evaluate the Raineswood Residential Training Center.

After both of these assessments, another M-team was convened on or about November 19, 1997. A written report of Dr. Freeman's had been faxed to the parents' counsel on or about

November 17, 1997. See Transcript of Proceedings, March 26, 1998, Exhibit 17, Vol. III, p. 834.

The parents contend that the NECC staff was not included in the November 19, 1997, M-team meeting and that Dr. Freeman never interviewed the parents. See Transcript of Proceedings, March 23, 1998, Vol. I, pp. 70-71. Since a Due Process Hearing had been implemented at that time, communication was primarily being conducted by and between counsel. Coffee County requested Plaintiffs' counsel to have the NECC staff available via telephone conference call. For whatever reason, there was no NECC participation at the November 19, 1997, M-team meeting. The staff of NECC did participate in the November 24, 1997, M-team meeting via conference call.

At the November 19, 1997, M-team meeting, Coffee County proposed a six (6) month transition phase during which it would continue to fund the child's current residential program at NECC from January 1, 1998 through June 30, 1998. The school system's position was also at that time that Raineswood would offer an appropriate public educational program for [redacted] including opportunities for the child to attend a self-contained class for children with autism in a regular elementary school environment and to have opportunities for integration with non-disabled peers. Dr. Freeman discussed her report and stated that she believed that the child's IEP could be implemented at Raineswood. See Collective Exhibit 17, DC-834, DC-835. There was a proposal to transition the child to Raineswood effective July 1, 1998. See Collective Exhibit 17, DC-0961-DC-0976. In addition, this IEP provided for regular visits to the Raineswood facility for the child's parents. See Collective Exhibit 17, DC-0961-DC-0976.

The parents were in disagreement with the proposed IEP and requested a Due Process Hearing. The hearing was initially scheduled for various dates in December 1997, but was

continued to March 1998 by agreement of the parties' respective counsel. The hearing was ultimately held on March 12, 14, 23, 25 and 26. After the conclusion of the hearing, post-trial briefs were forwarded to the Administrative Law Judge in this case. The Post-trial Brief by the State of Tennessee was received May 5, 1998. That of the Coffee County System was received May 4, 1998. The parents requested an extension of time from the initial deadline and this was given by agreement between the counsel for both parties and the Administrative Law Judge. The parents' post-trial brief was received on or about May 6, 1998.

Various issues have been raised by the parties herein. This Court shall try to address the issues as raised by the respective parties.

ARGUMENT

I. WAS THE SEPTMEBER 24, 1997, IEP AND THE NOVEMBER 19, 1997, IEP INAPPROPRIATE DUE TO THE LANGUAGE INCLUDED IN THEM BY COFFEE COUNTY STATING THE PLACEMENT AT THE NEW ENGLAND CENTER FOR CHILDREN FROM OCTOBER 1, 1997 THROUGH DECEMBER 21, 1997 AND FROM JANUARY 1, 1998 THROUGH JUNE 30, 1998 WAS NOT FOR EDUCATIONAL REASONS AND WAS NOT AN EDUCATIONAL PLACEMENT.

From the entire testimony in this cause, this Court finds that the parents of [redacted] are extremely well versed in autism, the various programs available, methodologies offered and their procedural rights. Unlike many parents who are not familiar with the administrative process and the rights available to them, it is apparent that the [redacted] have taken it upon themselves to become very knowledgeable. This is to be complimented.

The Memorandum of Understanding initially entered into between the three (3) state agencies and the [redacted] is merely a contract. This Court finds that there was no duress exerted by anyone on the parents and that the parents voluntarily signed the same. Had there been any major dispute at that time, the parents should have asked for a Due Process Hearing and

proceeded on the same if they were in disagreement. Apparently, this was an unprecedented move in Tennessee for these three (3) agencies to join together. No doubt it was the result of the publicity exposing the Tennessee government. The parents were represented by counsel at the September 24, 1997, and the November 19, 1997, M-team meetings. After this M-team, Coffee County sent a written notice to [redacted] as required by 20 U.S.C. §1415(b), (c). This is also mandated by 34 C.F.R. §300.504 and §300.505; State Board of Education Rules, Regulations and Minimum Standards, §0520-1-3-.09(5)(b).

Litigation had been initiated and was pending at the time of the development of this November 19, 1997, IEP. The testimony was adduced at trial by various individuals that the behavior of the child was an issue. From the testimony, it appears that the placement at NECC was largely due to the behavioral actions of the child and not as a result of the educational component of the child. Again, the parties were represented by counsel and entered into a voluntary contract. Settlement terms and contract negotiations are not prohibited by the Individuals with Disabilities Education Act. See Zvi D. vs. Amvach, 694 F2d 904 (2d Cir. 1982).

Tucker v. Calloway County Board of Education, 1998 WL 63009, F3d (6th Cir. 1998) dealt with various forms of educational methodology for children with autism. The Court in Tucker found that school systems do, in fact, have discretion in choosing educational methodologies for a child with autism. Moreover, the Court in Tucker found that the "stay put" provision did not require a school system to continue funding for a residential program. In Tucker, the parents of a five (5) year old autistic child had the child placed in Boston. They asked the school system to fund a program for the child. The original request was limited to that

summer program. However, at the end of the summer, the parents wanted the child to remain in the residential facility for an undetermined period of time.

The Sixth Circuit Court of Appeals held that "the stay put" provision was not applicable because the parents were not willing to consider any other placement than the Boston facility. The Court noted that moreover, the original agreement was for a definite period of time. See also Lachman vs. Illinois State Board of Education, 853 F2d 290 (7th Cir. 1998) (The Court held that the parents have no right to compel the school system to utilize a specific methodology for the education of a disabled child).

This is very similar to the case at hand in that the Memorandum of Understanding was to place the child at NECC for a period of 12 months. See Collective Exhibit 17, DC-550. This contract was extended by the state agencies for an additional three (3) months to expire on September 30, 1997. It appears that [redacted] does not want her child placed at another location other than NECC and is not willing to consider alternative placement. This is an analogous situation to the Tucker case. The Sixth Circuit Court is very clear that "stay put" requires the child's educational placement to continue throughout the due process procedures, state administrative review and appeals to either Federal or State court. See Karih v. Franklin Special School District, 26 IDELR 569 (6th Cir. 1997).

The language of the Memorandum of Understanding defines NECC as a non-educational placement. The testimony at trial indicates this was largely due to the child's behavior, because of medical needs, or for other reason unknown. The proposal on November 19, 1997 was for a transition period of six (6) months to be put in place and the child moved to Raineswood Facility. IDEA provisions indicate that the stay put provision is to continue the last agreed upon educational placement through the M-team process. The initial placement was due to the

Memorandum of Understanding between three (3) state agencies and was not as a result of the M-team process. The last M-team process proposed a transition period of six (6) months with the placement to be at Raineswood. It appears that the last M-team majority decision was that Raineswood would be the appropriate facility with a correct transition plan in place. The requirements of the transition plan and the transition to Raineswood were the last recommended placement for this child and are the child's current placement.

II. DOES THE TENNESSEE DEPARTMENT OF EDUCATION HAVE DIRECT RESPONSIBILITY FOR PROVISION OF FAPE TO DAVIS CHEATHAM SINCE IT WAS A SUPERVISORY STATE AGENCY TO COFFEE COUNTY?

Petitioners''s counsel cites various rules indicating that the states do in fact have a responsibility under IDEA and state law. Clearly, the state has the responsibility of overseeing that a proper and appropriate education is provided to all students with disabilities in Tennessee. 20 USC §1400(d); 20 USC §1412(a) (11); 34 CFR §300.600.

The other two (2) state agencies were not parties to this lawsuit by Petitioners. Petitioners primarily attempted to show at the hearing that the Department of Education has in fact become a direct provider of services to this child. The Court finds that the State Department of Education is not a direct provider for [redacted]. The State would only step in and become a direct provider when the local education agency is unable or unwilling to establish and maintain programs of free, appropriate public education or when that county has one (1) or more handicapped children who can best be served by regional or state centers designed to meet the needs of such children. See Todd D. vs. Andrews, 17 EHLR 986 (11th Cir. 1991).

When the State was going to terminate funding due to the desire of the other agencies involved, the local education agency, Coffee County, continued the funding for an additional nine (9) months beyond the original placement of one and a half (1½) years. It appears from the

testimony, Coffee County has continued to timely process invoices from NECC and there has been no disruption of the child's program. The child is still housed at NECC and will remain there until June 30, 1998. The Court finds that the TDOE was not and is not a direct provider in this case and that insufficient allegations have been proven against the State Department of Education in this case.

Given this, this moots the next issues of the Petitioners. Petitioners''s next issues state as follows:

(a) Does the TDOE bear direct responsibility for provision of FAPE to Davis as a direct provider of services?

(b) If TDOE was a direct provider, did it violate IDEA in failing to give parents in Coffee County proper notice of its decision to end funding of NECC on September 30, 1997 and "retreat" from further direct provider services?

While the State does have the ultimate responsibility of overseeing that each child is provided a free, appropriate public education, the TDOE did not become a direct provider in this instance as noted in 20 USC §1414(d); 34 CFR §300.360.

Joe Fisher, Executive Director, TDOE, testified that there is a direct procedure in place at the Tennessee Department of Education to assist the local schools when there are extraordinary expenses involved. There is Federal grant money provided to the Department and the Special Education Division reserves a portion of those funds for "high-cost" children. The Department has a procedure in place whereby local school systems are reimbursed generally up to sixty percent (60%) of the excess cost. However, a committee can decide to help the local school system 70, 80, 90 or even 100%. It does not have to grant a particular amount of reimbursement to the local education agency. See Transcript of Proceedings, March 14, 1998, Vol. II, pp. 174-177.

Apparently, there was resistance by Coffee County initially regarding placement of the child at NECC. Coffee County was concerned with getting the costs reimbursed, but Coffee County continued to in fact provide the services to the child.

On September 10, 1997, Coffee County requested continued assistance from TDOE for funding for [redacted] at NECC and indicated it needed more time to develop an appropriate plan for [redacted]. See Collective Exhibit 17, Vol. III, p. 780.

Apparently, there were various letters written back and forth between counsel and Joe Fisher and two (2) reports of Dr. Mulick and Dr. Iwata which were not contained in the child's record. Petitioners make a Motion in their Brief for inclusion of these documents in the child's cumulative record. This Court finds that the same is well-taken. It is hereby ORDERED that the letters between all counsel and Joe Fisher shall be included in the child's cumulative record, as well as the reports of Dr. Mulick and Dr. Iwata to Exhibit 17, Vol. III.

This Court finds that while cost was and generally is a concern in these instances, the reason to transfer the child from NECC was not due to cost, but was rather due to an M-team decision. It was initially contemplated at the time the Memorandum of Understanding was entered that the child would only remain at NECC for one (1) year. Tennessee apparently has made great strides in dealing with children with autism in the recent years. See Exhibit 8, Deposition of Commissioner Jane Walters, pp. 14-28, Exhibit 2 and Exhibit 4 to her deposition.

III. WAS THE NOVEMBER 19, 1997, IEP PROPERLY DEVELOPED BY THE M-TEAM?

The Petitioners contend that various procedural safeguards insured them by 20 USC §1415 have been violated. This section provides that there shall be written notice to the parents whenever the agency proposes to initiate or change the identification, evaluation or placement of the child. Based upon the testimony of Joe Fisher and other witnesses utilized by Petitioners,

including Bob Tipps, various options were being considered regarding transitioning [redacted] back to his home state of Tennessee. [redacted] actively participated in all the M-teams and were very knowledgeable regarding their rights. In fact, they were represented by counsel at most of the M-team meetings.

After the last M-team meeting of November 19, 1997, following the decision, the school system sent written notice to the parents in compliance with 20 USC §1415(b) and (c) and with 34 CFR §300.504. Due process hearings had been requested in the spring of 1996 and again in July of 1996. If the parents were in disagreement, due process hearings could have been requested previously and one was requested on October 8, 1997 before this M-team meeting.

There have been numerous evaluations of the child in question. See Collective Exhibit 17, Cumulative Record of Child. The Petitioners' experts did not conduct an individual assessment of the child. See Transcript of Proceedings, March 14, 1998, Vol. I, p. 88, Dr. Iwata; Transcript of Proceedings, March 25, 1998, Vol. II, pp. 115-117, Testimony of Dr. Mulick. The last evaluation was performed by Dr. Thomas Mates in April 1996. Under the provisions of the IDEA, the next three (3) year re-evaluation of the child is due in April 1999. There has been no proof that Coffee County or the State refused to have an independent educational evaluation conducted.

The Sixth Circuit is one of the most liberal circuits regarding compliance with procedural safeguards. Both the old law and the new law are clearly well stated that parents are to be included in the placement decision process. See State Board Rule and Regulation 0520-1-3-.09. Section 4(b) (3); 34 CFR §300. Neither the funding for the child's placement nor the child's actual placement were interrupted. The family has traveled to and from NECC and been fully compensated. The child's placement continued. There was no substantive deprivation of the

child's or parents' rights in this case. See Thomas v. Cincinnati Board of Education, 918 F2d 618 (6th Cir. 1990); Chuhran v. Walled Lake Consolidated School District, 22 IDELR 450 (6th Cir. 1995).

In the parents' Post-trial Brief, they recite that Dr. B. J. Freeman charged Thirteen Thousand Four Hundred and 00/100 Dollars ($13,400.00) for a report. This was incorrect. Dr. Freeman testified that she had been paid approximately Thirteen Thousand Four Hundred and 00/100 Dollars ($13,400.00) to date which included travel time, time to the NECC facility, observation, review of records, and preparation of her report. She did not charge that amount solely for writing the report herein. See Transcript of Proceedings, March 26, 1998, Vol. I.

The Court finds Petitioners' allegations without merit and finds that any alleged procedural violation is minimal and non-prejudicial herein.

IV. WHAT IS THE APPROPRIATE EDUCATIONAL PLACEMENT WHICH IS REASONABLY CALCULATED TO PROVIDE THE CHILD WITH A FREE, APPROPRIATE PUBLIC EDUCATION IN THE LEAST RESTRICTIVE ENVIRONMENT?

This issue requires the Court to look at the preponderance of the evidence presented in this case. It has long been established that the leading case for determining the appropriateness of an IEP is Board of Education of the Hendrick Hudson School District vs. Rowley, 458 US 176 (1982). The United States Supreme Court stated that there is a two (2) prong test involved. First, the IEP must be substantively appropriate by offering goals and objectives that are reasonably calculated to provide educational benefit to the child. Secondly, the procedural safeguards of the Act must be provided to the parents, including the right to participate in the development of the IEP and to receive notification and an explanation of their rights.

The Rowley case noted that while educational benefits must be meaningful, this does not mean that there must be a maximum benefit provided or the best available program provided.

See Rowley at pp. 200-202. This has also been examined by the Sixth Circuit Court of Appeals in the case of Doe vs. Tullahoma City Schools, 9 F3d 455. This case noted as follows:

> The Act requires that the school system provide the educational equivalent of a serviceable Chevrolet to every handicapped student . . . The school system is not required to provide a Cadillac . . .

Doe, supra at 459, 460.

The educational benefits must be more than "deminimis," but the Sixth Circuit Court of Appeals has held that the Act does not provide more than a basic floor of opportunity. See also Lenn vs. Portland School Community, 998 F2d 1083 (1st Cir. 1993); Rettig vs. Kent City School District, 788 F2d 328 (6th Cir. 1986); Clevenger vs. Oak Ridge School Board, 744 F2d 514 (6th Cir. 1984).

The Sixth Circuit Court of Appeals evaluated whether or not the state law provided an additional requirement upon systems. In Tucker, supra at 505, the Sixth Circuit Court of Appeals noted:

> Since an appropriate public education does not mean the absolutely best, a potential-maximizing education for the individual child . . . A court's review must focus on the district's proposed placement, not on the alternative that the family prefers . . . That proposed placement must be upheld if it was reasonably calculated to provide a disabled child with educational benefits.

It appears from the testimony produced at this hearing that not only the experts, but the child's parents and the school system agree on the goals for the child's education. The disagreement is to where and how this is to be implemented. The proposed IEP included provisions for a reduction in aggression toward others, reduction in self-injurious behavior (i.e. SIB, bolting) and other behavior problems. It also included goals for improving the child's communication and daily living/domestic skills. All the experts agree that the most critical area

is for an effective communication system for the child to express his needs and wants in an effective medium. See Collective Exhibit17, DC-1006-DC-10013; DC-1023-DC1034.

None of the experts who testified were experts in the field of autism other than Dr. B. J. Freeman. Each expert that testified was very credible in his or her respective area of expertise. The testimony produced by the experts also seems in agreement that it is important to transition the child to his home state (i.e. Raineswood). See Transcript of Proceedings, March 26, 1998, Vol. II, Testimony of John Umbreicht, pp. 190-194; Transcript of Proceedings, March 25, 1998, Vol. II, Testimony of Craig Kennedy, pp. 238-242; Transcript of Proceedings, March 26, 1998, Vol. I, Testimony of Dr. B. J. Freeman, pp. 96-98.

An appropriate curriculum for a child with severe disabilities must be functional, age-appropriate, community referenced, longitudinal and the curriculum being taught must support appropriate behaviors. See Transcript of Proceedings, March 26, 1998, Vol. II, Testimony of Dr. Umbreicht, pp. 242-245. Moreover, each of the experts seems to agree that an effective behavior management plan must be based on a thorough assessment of the antecedents and consequences of the child's behavior. Many of the experts had a problem with food being used as a constant reinforcer for appropriate behavior of the child. The videotape (Exhibit 19) shows that the child is given food on a regular basis. As Dr. B. J. Freeman noted, "the real world does not give out M & M's." See Transcript of Proceedings, March 26, 1998, Vol. I, p.60.

The parents are not entitled to dictate educational methodology or to compel a school district to supply a specific program for a disabled child. See Tucker, supra at 506; Lachman, supra; In Re: Henderson County Public Schools, 27 IDELR 435 (SEA NC 1997); Fairfax County Public School, 22 IDELR 80 (1995). The experts all testified that it is important for handicapped or disabled children to be exposed to children with non-handicapping conditions.

The child must be placed in the least restrictive environment. The least restrictive environment requirements are codified at 20 USC §1412 and 34 CFR §300.550 et seq. Tennessee State law has adopted these verbatim in Tennessee Code Annotated §49-10-103 (c) et seq.

Ronecker vs. Walters, 700 F2d 1058 (6th Cir. 1983) addressed the test for determining whether a placement meets the mainstreaming requirements of the IDEA. This requires the system to determine whether the services that make the residential placement superior could be feasibly provided in a non-segregated setting. It appears from the record that the experts are clear that the current IEP could be provided at Raineswood with an appropriate transition plan put in place. The components of the child's program at NECC are essential to his receipt of a free, appropriate public education. The child will benefit directly from the opportunity to attend a normal public elementary school with non-handicapped children. The child will have the opportunity to have lunch with his non-disabled peers, play at recess and to be integrated into the regular school setting. Most important, the child will be closer to his home. All the experts were in agreement that having the child transitioned home is the ultimate goal. See Remus vs. New Jersey Department of Human Services, 815 FSupp 141 (DNJ 1993).

Mr. Rick Graff from NECC testified that the child is occasionally taken to the park, but he is not educated with non-disabled students. [redacted] lives, eats and sleeps with eight (8) other autistic children. He is taught with one (1) other autistic child an entire day in a segregated classroom. See Transcript of Proceedings, March 12, 1998, Vol. I, Testimony of Graff, pp. 138-149. He has no opportunity to model age-appropriate behavior. Both Mr. Graff and Dr. Brian Iwata, Petitioners' witnesses, testified that the child was ready to and would benefit from visits to his home on weekends and holidays. See March 12, 1998, Transcript of Proceedings, Vol. I, pp. 162-168; Transcript of Proceedings, March 14, 1998, Vol. I, pp. 114-118.

Dr. B. J. Freeman, the leading expert in autism, was pleasantly surprised when she observed Davis and noted that he was a much different child than she expected to see based on what she had read about him. She noted there were lots of positives for him and those needed to be emphasized. See Transcript of Proceedings, March 26, 1998, Vol. I, pp. 108-112. As Dr. Freeman notes, no one is too disabled to be integrated with non-disabled peers. See Transcript of Proceedings, March 26, 1998, Vol. I, p. 107.

Ronecker did note that cost is a proper factor to consider when a school system's proposed placement offers free, appropriate public education in the least restrictive environment. Here both of the schools are capable of addressing the child's needs. Again, the ultimate goal is to have the child back in his home state as was noted at the outset from the Memorandum of Understanding. There must be a structured transition plan that would be developed to include relocation to a residential program in the State of Tennessee.

Rick Graff has been at NECC for twelve (12) years. Their primary focus is on applied behavioral analysis (ABA). ABA is a process/methodology whereby teachers seek to increase appropriate behaviors and decrease inappropriate behaviors. Graff contends that the picture exchange communication system (PECS) is appropriate for [redacted]. See Transcript of Proceedings, March 12, 1998, Vol. I, pp. 46-50. Graff himself acknowledged that [redacted] is challenging to teach. See Transcript of Proceedings, March 12, 1998, Vol. I, pp. 88-89. NECC has to try various methodologies to see what works at an appropriate time for this child. Again, NECC has applied discrete trial training and applied behavioral analysis in working with [redacted]. Mr. Graff testified that he has to know "where" [redacted] is going before he can state that he is "ready to go there or how he gets there." See Transcript of Proceedings, March 12, 1998, Vol. I, p 93.

Graff noted that the least restrictive environment is important. He noted that [redacted] does change classrooms but he is only with children in his age group from 7-11 years one (1) hour per day. Graff himself has not been to Raineswood nor talked to any staff. He has not talked with anyone at Coffee County other than some conversations with Ms. Priscilla Vantreese. He did not do a functional analysis on [redacted]. NECC did, however, do a functional assessment (direct observation and data collection). See Transcript of Proceedings, March 12, 1998, Vol. I, pp. 107-110.

Dr. Brian Iwata is a professor of psychology at the University of Florida. He is a psychological consultant and consults to the Department of Middle Tennessee Mental Health and Retardation. His focus is in applied behavioral analysis and educational and therapeutic arenas. See Transcript of Proceedings, March 14, 1998, Vol. I, pp. 4, 17. He has extensive credentials and has worked at John Hopkins and at the National Health Institute.

He himself went to NECC and visited in January 1998. See Transcript of Proceedings, March 14, 1998, Vol. I, p. 23. He spent time with the staff observing the child and reviewed data with Mr. Graff. He noted that since the child is not at Raineswood, evaluating the quality of the Raineswood program is difficult. He did go to Raineswood and speak with some individuals there. He notes that he has never claimed himself to be an expert in autism. See Transcript of Proceedings, March 14, 1998, Vol. I, p. 84. He did not do a cognitive evaluation of the child and agrees that the child should be returned to the least restrictive setting. He also noted it was very important for the child to visit the family and to return to their home community. See Transcript of Proceedings, March 14, 1998, Vol. I, pp. 110-119. Dr. Iwata testified he had no knowledge of Davis's experience before he went to NECC. He read the consultation report by Dr. Mates, but did not talk to any of the teachers at Coffee County nor review the school records. Dr. Iwata

testified that he thinks it would take between three (3) and six (6) months for the child to be transitioned to another appropriate setting.

Ms. Priscilla Vantreese testified that she has been the supervisor of Special Education at Coffee County since September 1996. She was not part of the September M-team but was part of the November 1997 M-team. She also went to NECC with Dr. Freeman to evaluate the NECC program. She went to Raineswood in October 1997 as well. She testified that Dr. Freeman was hired to help the County understand what would be appropriate for this child and to help with the transition if the child was to be returned to his home community. See Transcript of Proceedings, March 14, 1998, Vol. II, p. 260.

Ms. Carolyn Moore, a teacher at Raineswood, testified that she has a post-graduate degree in speech pathology. She testified that she has worked with autistic and mentally retarded children. She has had some PECS training and various training with autism. She has been at Raineswood for fourteen (14) years. See Transcript of Proceedings, March 23, 1998, Vol. II, pp. 155-163. She indicated that every program is to be individualized based on the individual IEP.

Raineswood offers a variety of activities. Monday nights are errands night. The children are taken to Wal-Mart, etc. where they learn such things as waiting in line, paying, listening to music, etc. Tuesday nights are time for older children to participate in Boy Scouts or Girl Scouts. Wednesday nights allow participation in Special Olympics at the fitness club at a local church. Here they work on skills unique for each child. Thursday nights include dining out at fast food places or Shoney's. Friday nights involve community activities such as football games, church activities, etc. On weekends, Ms. Moore testified it is just like home. The children are allowed to stay in and sleep late, have a late breakfast, go to movies, shop, etc. She testified that

each child goes home at least one (1) weekend per month. However, it all depends on the IEP for each child.

There is a certified teacher and two (2) paraprofessionals for each group. She indicated that functional analyses are done to see what each child's behavioral problems are. Medication charts are kept and there are regular meetings with the teachers and the aides for each child. She also noted that the PECS system is being placed at Raineswood and a psychologist will be on staff soon. See Transcript of Proceedings, March 23, 1998, Vol. II, pp. 207-210.

Ms. Barbara Bolton is the manager or supervisor of the Raineswood program and has held that position since 1992. She has training in ABA and has scheduled some for the staff. They have monthly meetings at Raineswood with the staff and teachers.

She herself went to NECC in December 1997. She noted that the PECS system and discrete trial techniques that are being provided at NECC can be provided at Raineswood. She indicated that there are students at Raineswood with severe behavioral problems similar to [redacted]. Thus, an appropriate behavioral program must be identified. Raineswood is also planning to hire a nurse, a speech pathologist and functional behavioral analyst. See Transcript of Proceedings, March 23, 1998, Vol. II, pp. 219-221, 242-245.

Dr. Mulick, an expert for the Petitioners, testified that he is in the Department of Pediatrics and Psychology. He deals with developmental disabilities and autistic children. He has a very impressive background and has been a consultant to public schools. Again, he is primarily a psychologist. He has been a participant in IEP teams since 1976 and has written goals and objectives before. His opinion is that Raineswood could implement the IEP with sufficient motivation and training, but it would take a transition period. See Transcript of Proceedings, March 25, 1998, Vol. I, pp. 36-37.

He stated he could not make a prediction about [redacted] success at Raineswood based solely on ABA. He indicated Raineswood could implement portions of the ABA program and noted that certain of the school portions of both facilities were roughly the same. See Transcript of Proceedings, March 25, 1998, Vol. I. He noted that NECC was more of a home environment and Raineswood was more of a dorm or institutional type setting. He has seen many other facilities like NECC. He feels it is very important to have a discharge criteria and plan in place. None was developed for [redacted] in this instance. Dr. Mulick, however, testified that in his opinion, it is far less important for the child to have interaction with non-disabled peers than to have his behavior controlled. He himself thought that the materials used with the child should be age-appropriate if the child has the prerequisites. He felt material utilized should support appropriate behavior and that the life-span of the cumulative approach contributes to the longitudinal approach.

Dr. Mulick did not interview anyone who had worked with the child prior to 1996 except the mother and he reviewed Dr. Mates's report. He did not do any independent verification of any information. He was very impressed with Ms. Lister and her strategies and technique and stated "it was about as good as it gets." Dr. Mulick also felt that the child should have the opportunity to have short visits at his home regardless of where he is placed. He noted that the question would be "when" not if.

Bridgett Lister testified. She teaches at Wells Station in Memphis. She teaches 10-13 year olds with severe behavioral problems and mental retardation. She has two (2) classroom aides and one (1) behavioral therapist at her disposal. A lot of her students have severe behavior problems. All of her students have behavioral management plans.

A typical day in her classroom involves breakfast, going to class, keeping a notebook, working on self-help skills, circle time where she emphasizes language and discrete trial techniques. She then works on IEP objectives where she focuses on cognitive skills, math, handwriting, etc. Her students may also go to the listening center where they hear stories, ask questions, participate in recess and lunch. Fridays are reward days. The children must have good behavior three (3) out of four (4) days to receive a reward which can be a video, games, etc. She has had discrete trial training and ABA techniques in place. See Transcript of Proceedings, March 25, 1998, Vol. II, pp. 175-182.

Dr. Craig Kennedy testified. He has a doctorate in special education from the University of California and is currently employed at Vanderbilt University. He is not an expert in autism, but is an expert in severe disabilities. See Transcript of Proceedings, March 25, 1998, Vol. II, p. 214. He noted that there are a range of techniques that have proven effective for teaching children with severe disabilities. He stated that using language is extremely important for the child. See Transcript of Proceedings, March 25, 1998, Vol. II, pp. 230-235.

When Dr. Kennedy went to NECC and observed, he noted the instruction was not age-appropriate in his opinion. He noted there was not really a curriculum in place for the child. He also noted the child was playing with toys for children aged 2-5 years. See Transcript of Proceedings, March 25, 1998, Vol. II, pp. 242-244. He indicated that discrete trials were not functional in his opinion and the child was not being taught to discriminate.

He also noted that he does not think food is a very functional reinforcer. See Transcript of Proceedings, March 25, 1998, Vol. II, p. 246. He noted it is very important to take the child's strengths and interests and build on them. There are various factors which must be examined which include what the family would like the child to do, what the child's strengths and

weaknesses are and what the non-disabled children are doing. Again, he noted you have to look at the individual needs of the child and make certain the child is ready to be integrated. See Transcript of Proceedings, March 25, 1998, Vol. II, pp. 276-278.

Dr. B. J. Freeman is an expert in the field of autistic children. She is currently Director for the Outpatient Center for Autism and works with the Neuropsychiatric Institute for Autism, Developmental Disabilities in California. She is also a licensed clinical psychologist in California. She has done research projects on over 1500 children alone. She is on staff at the UCLA Hospital and is a professor. She testified that she has been involved in various aspects of various children's plans. She is generally primarily involved at the request of the parents, but has testified on behalf of both parents and schools.

She stated that autism is a social, communication learning disability. There is a lot of difference of opinion in this area. She also indicated autism may be a biological disorder. See Transcript of Proceedings, March 26, 1998, Vol. I, pp. 43-48. Various research today focuses on genetics, the immune system, etc. Dr. Freeman indicated that a diagnosis is made by looking at three (3) areas of the child: 1) social skills, 2) repetitive behavior and 3) communication skills. She noted that 50% of autistic children are mentally retarded and others are not. Freeman noted that developmental delays in autistic children are important. Ups and downs are very frustrating for the child. She also noted there is no cure for autism as is a physical problem in the brain. Therefore, one must have a complete picture of the development of the child and look at the longitudinal approach. See Transcript of Proceedings, March 26, 1998, Vol. I, p. 60.

Dr. Freeman indicated psychological evaluations should not be used to assign IQ scores. The evaluations should be used to gather information about how the child functions in the environment and develops approaches to learning. She noted that generally when a child is

diagnosed as autistic, there is a five (5) step process the family engages in: 1) denial, 2) distortion, 3) search for the "magic cure" ("we try everything"), 4) projection ("someone else's fault"), and 5) acceptance. She noted that [redacted] has had at least 22 different types of intervention here. What he needs most, in her opinion, is to develop functional skills. He needs social, communication and self-help skills, independence, domestic skills, academics and mobility. His programs need to be age-appropriate and need to support positive behavior in the real world. Freeman noted that the real world does not give out M & M's and food for good behavior. There must be community referenced skills.

In Freeman's professional opinion, [redacted] does not need another psychological evaluation. She noted that [redacted] was precipitously placed in NECC and there is no transition plan in place from the community to NECC. She feels there must be a transition plan for [redacted] to return back to the community. In her opinion, [redacted] continues to need residential placement at this time but notes that his needs have changed since the date of her report. See Transcript of Proceedings, March 26, 1998, Vol. I, pp. 82-83. When she saw [redacted], she had a very different impression of him. In her opinion, [redacted] has a lot more potential than she initially thought. She noted, however, there has never been a consistent communication system tried with this child. See Transcript of Proceedings, March 26, 1998, Vol. I, pp. 85-87.

Dr. Freeman further testified that any attempt of [redacted] at communication should always be responded to. She has major concerns that the child is always receiving food as a prompt.

While she Freeman noted that Raineswood has had some training in the PECS system, they need more. Freeman indicated that it is time for [redacted] to move back into the community. She has major concerns if he is not moved. In her opinion, the IEP from NECC and the proposed IEP from Coffee County are both identical. Again, she notes that there must be a

transition plan to get the child back to the community. See Transcript of Proceedings, March 26, 1998, Vol. I, pp.104-106.

Dr. Freeman testified that the goals in the IEP must be stated in a positive way. The focus needs to be not only on decreasing bad behaviors but also on increasing good behaviors.

She testified that [redacted] needs a communication system. It is impossible to really know his level of retardation since he cannot fully communicate. If he is severely mentally retarded, he could not have picked up the PECS system as quickly as he has. Children are individuals and no one way of teaching is appropriate.

Dr. Freeman's long-term outlook for this child is that [redacted] be at Raineswood for one (1) to two (2) years and transitioned to a group home and/or his own home community. The ultimate goal she notes is, as did the other experts, is that [redacted] needs to be returned as close to his home base as possible.

Another expert, Dr. John Umbreicht, testified. He is currently employed at the University of Arizona in the Department of Special Education. His specialty is functional assessments and behavioral analysis. He does not consider himself to be an expert in autism.

He testified regarding the functional behavioral assessment. Dr. Umbreicht testified that this helps one understand "why." It helps understand why someone is doing what he or she is doing. He testified regarding the ABC model. This indicates antecedent behavior and consequences that the behavior produces. See Transcript of Proceedings, March 26, 1998, Vol. II, pp. 171-176.

Dr. Umbreicht further testified regarding how to give a functional assessment. He said there are steps which include: 1) define an area of concern, 2) define and replace the behaviors that you want the person to be doing, 3) conduct structured interviews, 4) exclude things that can

be causing the behavior, and 5) actually watch and collect ABC data. Umbreicht noted that patterns in the behavior are very important. Once an expert has ascertained why, he or she can develop interventions.

Dr. Umbreicht testified that any significant characteristics of a good curriculum include the following: First, they must teach a person to be functional. They must be taught to be independent, task-oriented, and enjoy a better quality of life. Secondly, it must be appropriate for the person's chronological age. Third, there must be a community reference. What would be done in a person's "community" where that person lives. Fourth, the curriculum must support appropriate behavior. Fifthly, it must be longitudinal. There must be a logical progression in what is being done. Finally, the curriculum must be done in the least restrictive environment. See Transcript of Proceedings, March 26, 1998, Vol. II, pp. 185-187.

Dr. Umbreicht viewed NECC and Raineswood. He talked with Carolyn Raineswood and found that she was extremely knowledgeable. He testified he would even like to take her back to work for him in Arizona. He observed Bridgett Lister's class and found that the children were highly engaged in what they were supposed to be doing. He noted that Ms. Lister engaged in incidental teaching and there was not a high rate of bad behavior in her classroom.

Umbreicht's impressions of NECC were it was a very nice physical environment. It reminded him of what he used to see in the 1970's. He thinks it is an institutional program and noted that a lot of the things NECC did were not done in context.

In his professional opinion, Davis was not being educated in the least restrictive environment. [redacted] is currently in a segregated locale at NECC. Moreover, Umbreicht felt that inappropriate teaching methods were being used. Dr. Umbreicht even eventually thinks that [redacted] could be placed in a public school setting. He notes that [redacted] is not too disabled to

interact with his non-disabled peers. In his opinion, interaction is essential with the non-disabled. He also is of the opinion that there should be a transition. Dr. Umbreicht testified that the transition time did not require NECC participation, but noted it would be very helpful. In his professional opinion, the transition could be done immediately.

Hearing officers have notable discretion in conducting the hearing and determining the scope of evidence. See Board of Education, 27 IDELR 419 (NY SEA 1997); Sequoia Union H.S. Dist., EHLR 507:495 (Cal. SEA 1986); Eagle Union School Corp., 26 IDELR 106 (Ind. SEA 1996).

Again, all the experts who testified were not in disagreement regarding the fact that transition can be accomplished and a transition plan needs to be in place. Of utmost importance is the welfare of this child and how this child can be educated in the least restrictive environment. From all of the testimony, this Court finds that a transition plan must be developed in the next three (3) to six (6) months and [redacted] transitioned to Raineswood. Raineswood can provide the same services as NECC, is the least restrictive environment and is close to the child's home base.

CONCLUSION

Based on the foregoing facts and law, this Court finds that there are insufficient allegations against the Tennessee Department of Education and they are hereby dismissed from this action.

The Court further finds that if there were procedural violations, they were minimal and non-pre-judicial. The Court further finds that the Petitioners were represented by counsel and participated actively in all the M-teams since Spring 1996.

It is further ordered that an M-team meeting shall be convened within ten (10) days of this Order to develop an appropriate transition plan for [redacted] to return to the Coffee County System within the next three (3) to six (6) months. An appropriate IEP will be prepared to allow the transition and to anticipate the child's goals and needs once he is returned to the Raineswood system.

The Court further finds that Coffee County and the State of Tennessee are the prevailing parties for purposes of this hearing.

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or may seek review in the United States District Court for the district in which the school system is located. Such appeal and review must be sought within sixty (60) days of the date of the entry of the Final Order in non-reimbursement cases or three (3) years in cases involving education costs and expenses. In appropriate cases, the reviewing Court may order that this Final Order be stayed pending further hearing in this cause.

If the determination of the hearing officer is not fully complied with and implemented, the aggrieved party may enforce it by proceeding in the Chancery or Circuit Court under the provisions of Tennessee Code Annotated §49-10-601 et seq.

Within sixty (60) days from the date of this Order (or thirty (30) days if the Board of Education chooses not to appeal), the location education agency shall render in writing to the District Team Leader and the Office of Compliance, Division of Special Education, assurance of compliance with the provisions of this Order.

ENTERED this the 24th day of June, 1998.

KIMBERLY K. WHALEY
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Order has been mailed to the following on this the 23rd day of June, 1998:

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